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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 357

ATLANTIC GREYHOUND CORPORATION
Petitioner,

vs.

WALTER HUNT, ADMINISTRATOR OF MARY ELLEN HUNT, JOSEPHINE HUNT, BY HER NEXT FRIEND, WALTER HUNT, LEROY HUNT, BY HIS NEXT FRIEND, WALTER HUNT, AND BOBBY WARREN HUNT, BY HIS NEXT FRIEND, WALTER HUNT (CONSOLIDATED FOR TRIAL)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

ROY L. DEAL,
FRED S. HUTCHINS,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The Atlantic Greyhound Corporation, petitioner, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit entered in the above causes affirming the judgments of the United States District Court for the Middle District of North Carolina.

Opinion Below

The opinion of the Circuit Court of Appeals is reported in — F. 2d — (R. 164-169).

Jurisdiction

The judgment of the court below was entered July 16, 1947 (R. 169). The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. Federal jurisdiction was based on diversity of citizenship.

Questions Presented

Actions in tort were brought in the District Court against the petitioner by three minors for personal injuries and by the administrator of a deceased minor for her death, resulting from the collision in North Carolina of an automobile, driven by their father, in which they were riding and the petitioner's bus.

The questions presented are:

1. Whether the Circuit Court of Appeals misstated and misapplied an important local rule in the law of proximate cause with respect to intervening negligence by holding that the following instructions to the jury:

> "* * * the negligence must be the proximate cause, that is, an efficient cause, which in continuance sequence produces the injury complained of and without which the injury would not have occurred."
>
> "* * * as I stated to you in the outset, if you find that that negligence on the part of Walter Hunt was the sole, proximate cause of the injury to these plaintiffs, then it would be your duty to find a verdict against the plaintiffs and in favor of the defendant."
>
> "* * * but it is your duty to consider any evidence here that shows any negligence on the part of the operation of the Hunt car, any evidence of negligence on the part of the bus driver in order to determine whose negligence really caused the trouble. That is your duty to decide whether the negligence of Walter Hunt alone caused it and if it did, the defendant should not be required to pay for it, * * *",

which omitted all reference to the essential elements of intervening negligence and its "foreseeability", were sufficient, notwithstanding that petitioner had in apt time, the evidence fully warranting it, requested the trial judge to give a special instruction that:

> "The proximate cause of an event must be understood to be that which in natural and continuance sequence, *unbroken by any new and independent cause* produces that event, and without which such event would not have occurred. *The test of which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury should be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and resulting injury is one that the author of the primary negligence could have reasonably foreseen and expected.*"
>
> "*The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resulting injury. The test is whether the intervening act and the resulting injury is one that the author of the primary negligence could have reasonably foreseen and expected. The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor.*" (The trial court refused to give those portions of the special instruction in italics.)

2. Whether the Circuit Court of Appeals should not have granted a new trial because of the error of the trial court in instructing the jury that the violation of North Carolina statutes requiring a motor vehicle to have adequate brakes (G. S. 20-124, App. 15), and requiring a motor vehicle making a left turn to pass to the right of the center of the inter-

section (G. S. 20-153(a)) was only evidence of negligence, whereas the North Carolina courts hold such acts to be negligence *per se*.

Statutes Involved

The statutes involved are set out in the Appendix, *infra*, pp. 15-18.

Statement

About 7 o'clock in the evening of July 31, 1945, in Ronda, North Carolina, there was a collision between the automobile of Walter Hunt, in which his children, respondents and respondent's intestate, were riding, and a bus of the petitioner. The collision occurred in the intersection of State Highway No. 268, the dominant highway, and Traphill Road, the servient highway.

There was compelling evidence that the negligence of the father, Walter Hunt, was the intervening proximate cause of the collision.

Traphill Road descends from the north and dead-ends (toward the south) into No. 268, the latter running approximately east and west. The intersection is part of a slight curve in No. 268, to the right of one going west. There is a highway stop sign on Traphill Road 94 feet from No. 268. Traphill Road is unpaved and is narrow, but flares out at the intersection to a width of 96 feet. The pavement on No. 268 is 20 feet wide.

On the left, as one leaves Traphill Road and enters the intersection, there is a bank 8 feet high. Because of this bank, one would have to be within a few feet of No. 268 before westbound traffic on No. 268 would come within the range of vision.

Walter Hunt, accompanied by his wife and four children, drove his 1934 model Ford automobile, admittedly with faulty brakes (R. 43, 19, App. p. 68, 44) down Traphill Road

toward the intersection. Respondent's witness, the state highway patrolman who investigated the collision, testified as to Hunt's car, "It was a '34 Ford—'34 model Ford—mechanical brakes. The car was in right bad shape, just worn out shape, a car of several years operation"(R. 32, App. p. 57). About two weeks before the collision, Hunt told the witness, Roope, (R. 43, App. p. 68) that his car "didn't have any brakes on it"; at the trial Hunt admitted he had not had it repaired (R. 69, App. p. 44). Hunt admitted (R. 11, 69, App. pp. 35 and 94) that he came out of the Traphill Road *on the left.* The uncontradicted evidence was that he came out on the extreme left close to the eight-foot bank (R. 36, App. pp. 76, 96).

The only evidence that Hunt stopped in obedience to the stop sign and the North Carolina statute was his own, which was vague as to where he stopped and contradictory (R. 11, 12, 18, 19, 20, 69, App. pp. 36, 37, 43, 44, 45, 94). All the eye-witnesses testified he failed to stop, and entered the intersection at from 30 to 35 miles per hour (R. 40, 44, 51, 57, 61, 71, App. pp. 65, 69, 76, 82, 86, 96). Hunt testified that he had entered the intersection, had completed his turn, and had straightened up on the south side of No. 268 where the bus struck his automobile on Hunt's right and the bus' left side of No. 268. All the evidence except Hunt's was that his automobile had not completed the turn to the left but was practically straight across No. 268, the greater part of the Ford being on the south side of No. 268, and that the bus turned to the left and its front struck the left side of the Ford near its door and a little south of the middle line of No. 268 (R. 47, 48, 50, 51, 58, App. pp. 72, 73, 75, 76, 83). Marks made by the Ford's wheels contradicted Hunt and corroborated the other witnesses (R. 32, 33, App. pp. 57 and 58) as to the Ford's position across No. 268 when struck.

There was convincing evidence that the bus was entering the intersection or was just about to enter it when Hunt drove his car into the intersection immediately in front of the bus (R. 17, 45, 52, App. pp. 42, 70, 77, 84).

The bus driver turned to the left in an effort to avoid a collision (R. 59, App. pp. 75, 83). A bus passenger testified:

> "When I saw the car coming off of the highway, it was coming down grade, and coming right practically towards the bus, and the bus driver he cut across looked like to try to avoid hitting the car, and it crossed about straight across in front of him and he hit the car."

The bus stopped within the intersection, the front of it being just by the middle line of Traphill Road extended into the intersection. It stopped over the point of collision, the bus being 34 feet long and 26 feet of it having passed the point of collision. (Plaintiff's witness, the highway patrolman, R. 24, 25, App. pp. 49 and 50). The skid marks made by the bus were only 6 to 8 feet long (R. 25, App. p. 50).

It thus appears that there was ample evidence that Hunt was guilty of at least three negligent acts which intervened and proximately caused the collision as follows:

(1) Failing to stop at intersection;

(2) Driving a car with inadequate brakes down grade into a main highway;

(3) Driving out of the side road on his extreme left into the face of approaching traffic, close to and from behind a high bank, where by obeying the law he would have driven to his right of the center of the intersection at least 48 feet to the west, where he could see and be seen, thereby violating the provisions of General Statutes of North Carolina, Section 20-153(a) (App. 16).

Petitioner in each of its answers plead- such negligence of Walter Hunt as the proximate cause of the collision (Par. II, III and IV of answers, R. 6-9).

Petitioner in apt time requested a special instruction (R. 117-121, App. pp. 142-146) relating to the negligence of Hunt as the intervening efficient cause, not reasonably foreseeable by the petitioner's driver, which to use the North Carolina term "insulated" or rendered inoperative any negligence by petitioner's driver, as follows:

> "(1) The defendant contends that its bus was on a regular schedule; that the driver thereof was acquainted with the intersecting highway at the point of the accident and knew that a "stop" sign had been erected at the entrance of Traphill road to Highway No. 268 and that knowing this, that he had a right to assume that a person entering the main highway from Traphill Road would obey the law and bring his automobile to a full stop before entering the said intersection; that the driver of the bus had the right to assume that Walter Hunt would bring his automobile to a full stop near enough to the main travelled highway and on the right side of Traphill road where his automobile could be seen at a reasonable distance from his approach to the intersection; the defendant further contends that Walter Hunt was approaching the said intersection from behind a high bank, and on the left side of Traphill road, at a point, where he could not be seen on account of the bank until he had emerged therefrom; that after the bus driver had entered the intersection and was traversing the same, that Walter Hunt suddenly and abruptly ran out into the intersection from behind this bank, at a time, at a place, in a manner and at a speed so as to make it impossible to avoid a collision; thet the negligence of Walter Hunt was gross and palpable; that the bus driver could not have reasonably foreseen such unlawful conduct, and that if the driver of the bus was guilty of any negligence, which the defendant strenuously and absolutely denies, that the gross and palpable negligence of Walter Hunt insulated any negligence on his part, and was an intervening

act on Walter Hunt's part which was reasonably unforeseeable, and the cause without which the collision and injury would not have occurred.

And the court charges you, Gentlemen of the Jury, that the doctrine of insulating the negligence of one by the subsequent intervention of an act of negligence of another really belongs to the definition of proximate cause. While there may be more than one proximate cause that which is new and entirely independent breaks the sequence of events and insulates the original or primary negligence. For an illustration, I may be negligent on a particular subject matter. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence so that I cannot be sued for the mischief which a person so intervening directly produces. He is the one who is liable to the person injured.

The proximate cause of an event must be understood to be that which in natural and continuance sequence, unbroken by any new and independent cause produces that event, and without which such event would not have occurred. The test of which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and resulting injury is one that the author of the primary negligence could have reasonably foreseen and expected.

The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resulting injury. The test is whether the intervening act and the resulting injury is one that the author of the primary negligence could have reasonably foreseen and expected. The law only requires

reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. Foreseeable injury is a requisite of proximate cause and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted.

Measured by this standard, the defendant contends that the driver of its bus could not have reasonably foreseen that Walter Hunt would enter the main travelled highway without coming to a full stop where the law so required him to come to a full stop, or come to a full stop close enough to the main travelled highway so as to be able to see approaching traffic before entering same, and that Walter Hunt violated the law and the rules of the road in failing to come to a full stop and in approaching from the left side of the Traphill road and in coming into the said main highway at a high and unreasonable rate of speed under the circumstances; that it was unforeseeable on its driver's part and that he had the right to assume that Walter Hunt, or anyone else, approaching from this side road where there is a 'stop' sign would obey the law and come to a stop at a point and at a place where he could see approaching traffic, and that when he failed to do this, but entered without stopping at a high rate of speed when the vehicles were so close together that it was impossible to avoid a collision, that such conduct on the part of Walter Hunt, the defendant contends, was gross and palpable negligence which the bus driver did not and was not required to foresee, and that if there were any negligence on his part, that it was insulated by the gross and palpable negligence of Walter Hunt, and that such negligence on the part of Walter Hunt was the proximate cause of the collision and injury, and, the court instructs you, Gentlemen of the Jury, that if you find the facts in this respect to be as contended for by the defendant, that the plaintiffs would

> not be entitled to recover in this action, and it would be your duty to answer the first issues 'No.' Butner *v.* Spease, 217 N. C., page 82."

The trial judge refused each paragraph of the instruction and so marked each of them (R. 121, App. 146).

At the conclusion of the charge and before the jury retired, counsel for the petitioner (R. 104-108, App. 129 to 133) again called the court's attention to the petitioner's contentions as to intervening efficient cause, and repeated the request for instructions thereon (R. 108, App. 133).

By so doing petitioner fully complied with the provisions of Rule 51, District Court Rules: *Sprinkle* v. *Davis*, 104 F. (2) 487, 490.

Specification of Errors to Be Urged

(1) The court below erred in holding that the general definition of proximate cause given the jury by the trial judge, in substance as follows:

> "* * * the negligence must be the proximate cause, that is, an efficient cause, which in continuance sequence produces the injury complained of and without which the injury would not have occurred",

which would be applicable in any case based on negligence, is also sufficient in a case like this one in which the evidence strongly indicates *intervening efficient* cause and in which the defendant specifically relies thereon as a defense and requests special instructions covering that special phase of the law of proximate cause (Special instruction No. 11, App. 142-146).

(2) The court below erred in failing to grant a new trial because of the error of the trial court in instructing the jury that the violation of North Carolina statutes requiring a motor vehicle to have adequate brakes (G. S. 20-124,

App. 15) and requiring a motor vehicle making a left turn to pass to the right of the center of the intersection (G. S. 20-153(a)) was only evidence of negligence, whereas the North Carolina courts hold such acts to be negligence *per se*.

Reasons for Granting the Writ

I

In this case the Circuit Court of Appeals has decided an important question of local law probably in conflict with applicable decisions of the Supreme Court of North Carolina, and with the great weight of authority in other States. That is, the Circuit Court of Appeals erred in holding that in a tort action based on negligence, the trial court may give the jury only a general instruction as to proximate cause and may omit any reference to the law of intervening efficient cause, although special instructions as to this special phase of the law of proximate cause *is* requested in apt time.

> "Where a timely request is made for special instructions which correctly propound the law and which are warranted by the pleadings and the evidence in the case, it is the duty of the court to give them unless covered by other instructions given, or by the general charge, and a non-compliance with this duty will necessitate a reversal where it cannot be said that appellant was not prejudiced, * * *". (5 C. J. S., Appeal and Error, page 1155, Section 1774(a)).

Calhoun v. *Highway Commission*, 208 N. C. 424;
Greer v. *Hayes*, 221 N. C. 141;
Shelley v. *New York, N. H. & H. R. Co.*, 93 F. (2) 479;
Gold v. *United States*, 102 F. (2) 352;
Sprinkle v. *Davis*, 104 F. (2) 487;
Smith v. *Carrington*, 8 U. S. (4 Cranch) 62, 71;

Thorwegian v. *King*, 111 U. S. 549;
Pennsylvania Ry. Co. v. *F. Jacoby & Co.*, 242 U. S. 89;
Weiler v. *U. S.*, 323 U. S. 606,

and cases from 34 States cited in footnote to above quotation from C. J. S.

The special instruction requested (No. 11, R. 117) is a correct statement of the law of North Carolina as to intervening efficient cause. The special instruction (except for the contentions as to the facts) is taken practically verbatim from *Butner* v. *Spease*, 217 N. C. 82.

It is also supported by the following North Carolina cases:

Harton v. *Telephone Co.*, 146 N. C. 430;
Lineberry v. *N. C. Ry. Co.*, 187 N. C. 786;
Craver v. *Franklin Cotton Mills*, 196 N. C. 330;
Hinnant v. *Railroad*, 202 N. C. 489;
Baker v. *Railroad*, 205 N. C. 329;
Reeves v. *Staley*, 220 N. C. 573.

In *Reeves* v. *Staley*, *supra*, in which the facts were, as a matter of legal principle, almost identical with the facts in this case the Supreme Court of North Carolina dismissed the action, holding that as a matter of law the negligence of the driver of the car in which plaintiff's intestate was a passenger was the intervening proximate cause of her death. In that case, the court stated the following principles of intervening proximate cause:

> "Foreseeability is the test of whether the intervening act is such a new, independent and efficient cause as to insulate the original negligent act. That is to say, if the original wrongdoer could reasonably foresee the intervening act and resultant injury, that the sequence of events is not broken by a new and independent cause, and in such event the original wrongdoer remains liable."

* * * * * * *

"However, a motorist is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act on the assumption that others will exercise ordinary care for their own safety. * * *".

In other jurisdictions failure to give such a special instruction as to intervening proximate cause has been held reversible error:

Texas & N. O. Ry. Co. v. *Robinson,* (Tex.) 57 S. W. (2) 938;

Flemming's Fraternal Undertaking Co. v. *Quarrels,* (Tex.) 116 S. W. (2) 1160;

John Webber et. ux. v. *Park Auto Transportation Co.,* 138 Wash. 325, 244 Pac. 718;

Montgomery Ward & Co. v. *Snuggins,* 103 F. (2) 458.

In *Texas & N. O. Ry. Co.* v. *Robinson,* supra, the court said:

"Appellant also complains of the court's definition of proximate cause. The trial court defined it as 'a direct and immediate cause, without which the injuries and damages to the cattle complained of would not have happened.' Appellant objected to same because it did not include the added condition that such cause must be 'unbroken by any efficient intervening cause,' citing Robertson & Mueller *v.* Holden (Tex. Com. App.) 1 S. W. (2) 570, and Hulen *v.* Ives (Tex. Civ. App.) 281 S. W. 350. Such a definition is approved in the cases cited. While the definition given by the court would ordinarily be sufficient, if there be evidence of an independent or intervening agency between the negligence charged and the injuries sustained, which the jury might have found caused such injuries, the court should further qualify or extend such definition so as to cover it."

One can read the opinion of the Circuit Court of Appeals and from the opinion alone readily see the error. The opinion conceded the North Carolina rule as to intervening proximate cause and stated that it is "a specific application of the theory of proximate cause," but fell into the obvious error of holding that a general definition of proximate cause without more covered the specific rule as to intervening proximate cause. It is a matter of public concern that the error be corrected.

II

The Court instructed the jury (R. 108, App. 133), over the objection of the defendant, that a violation of the North Carolina statutes with respect to brakes, with respect to the duty of one approaching the highway at an intersection to keep to his right, and to operate an automobile with due care and have his vehicle under such control so as to avoid injury to the people on the highway is "evidence of negligence." When the defendant objected to this statement on the ground that such violations were negligence per se, the court stated that "they have changed that rule."

That the court erred in this respect is clearly established by the following North Carolina decisions:

Holland v. *Strader,* 216 N. S. 436;
Smart v. *Rogers,* 217 N. C. 560;
Williams v. *Woodward,* 218 N. C. 305; and
Conley v. *Pierce-Young-Angle Co.,* 224 N. C. 211.

Conclusion

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

The following Sections are part of Chapter 20, Motor Vehicles, the General Statutes of North Carolina:

Section 20-124. Brakes.

"(a) Every motor vehicle when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop such vehicle or vehicles, and such brakes shall be maintained in good working order and shall conform to regulations provided in this section.

"(c) On a dry, hard, approximately level stretch of highway free from loose material, the service (foot) brake shall be capable of stopping the motor vehicle at a speed of twenty miles per hour within a distance of twenty-five feet with four wheel brakes. The hand brake shall be capable of stopping the vehicle under like conditions of this section within a distance of not more than seventy-five feet.

"(d) Motor trucks and tractor-trucks with semi-trailers attached shall be capable of stopping on a dry, hard, approximately level highway free from loose material at a speed of twenty miles per hour within the following distances: thirty feet with both hand and service brake applied simultaneously and fifty feet when either is applied separately, except that vehicles maintained and operated permanently for the transportation of property and which were registered in this or any other state or district prior to August, 1929, shall be capable of stopping on a dry, hard, approximately level highway free from loose material at a speed of twenty miles per hour within a distance of fifty feet with both hand and service brake applied simultaneously, and within a distance of seventy-five feet when either applied separately."

Section 20-140. Reckless Driving.

"Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard

of the rights or safety of others, or without due caution and circumspection and at a speed and in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving, and upon conviction shall be punished as provided in 20-180."

Section 20-146. Drive on right side of highway.

"Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway, and shall drive a slow-moving vehicle as closely as possible to the right hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway and except when overtaking and passing another vehicle subject to the limitations applicable in overtaking and passing, set forth in 20-149 and 20-150."

Section 20-153. Turning at intersection.

"(a) Except as otherwise provided in this section, the driver of a vehicle intending to turn to the right at an intersection shall approach such intersection in the lane for traffic nearest to the right hand side of the highway, and in turning shall keep as closely as practicable to the right hand curb or edge of the highway, and when intending to turn to the left shall approach such intersection in the lane for the traffic to the right of and nearest to the center of the highway, and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left.

"(b) For the purpose of this section, the center of the intersection shall mean the meeting point of the medial lines of the highways intersecting one another."

Section 20-154. Signals on starting, stopping or turning.

"(a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such move-

ment shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement.

"(b) The signal herein required shall be given by means of the hand and arm in the manner herein specified, or by any approved mechanical or electrical signal device, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the department.

Whenever the signal is given the driver shall indicate his intention to start, stop, or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth.

Left turn—hand and arm horizontal, forefinger pointing.

Right turn—hand and arm pointed upward.

Stop—hand and arm pointed downward.

All signals to be given from left side of vehicle during last fifty feet traveled."

Section 20-155. Right-of-way.

"(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in 20-156.

"(b) The driver of a vehicle approaching, but not having entered an intersection and/or junction, shall yield the right-of-way to a vehicle within such intersection and turning therein to the left across the line of travel of such first mentioned vehicle: Provided, the driver of the vehicle turning left has given a plainly visible signal of intention to turn as required in 20-154."

Section 20-158. Vehicles must stop at certain through highways.

"(a) The state highway and public works commission, with reference to state highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. No failure so to stop, however, shall be considered contributory negligence per se in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence."

Section 20-164. Driving on mountain highways.

"The driver of a motor vehicle traversing defiles, canyons or mountain highways shall hold such motor vehicle under control and as near the right hand side of the highway as reasonably possible, and upon approaching any curve where the view is obstructed within a distance of two hundred feet along the highway, shall give audible warning with a horn or other warning device."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 357

ATLANTIC GREYHOUND CORPORATION,
Petitioner,

vs.

WALTER HUNT, ADMINISTRATOR OF MARY ELLEN HUNT, JOSEPHINE HUNT, BY HER NEXT FRIEND, WALTER HUNT, LEROY HUNT, BY HIS NEXT FRIEND, WALTER HUNT, AND BOBBY WARREN HUNT, BY HIS NEXT FRIEND, WALTER HUNT
(Consolidated for Trial)

RESPONDENTS' BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

RAYMOND KYLE HAYES,
North Wilkesboro, N. C.;
WM. M. ALLEN,
HOKE F. HENDERSON,
ALLEN & HENDERSON,
Elkin, N. C.;
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Statement of Facts

Four minor children of Walter Hunt were riding in the back seat of the Hunt car (R. 137) which had entered Highway 268 from the Traphill Road on the north (R. 26). The Traphill road was paved for a distance of 170 feet north of Highway 268 (R. 62, 63). The Hunt car, having entered the intersection, passed the center line of Highway 268, and

straightened up on the south side of 268 was struck by the petitioner's bus which was traveling west on its wrong or left side of the highway at an excessive rate of speed (R. 12, 13, 14, 157), hitting the Hunt car near its left rear fender and knocking it backwards some 60 feet off the highway to a point where it was stopped by a tree (R. 23, 24), resulting in the death of one child and serious and permanent injuries to the other three children.

These actions were brought on behalf of the children for the death and for injuries sustained in the collision. A jury from the Middle District of North Carolina, after having received proper instructions as to the law applicable to these cases by the able presiding Judge, Johnson J. Hayes, and upon the evidence of negligence of the petitioner, rendered a verdict in favor of the children to compensate them for their injuries.

Thereafter the petitioner appealed the actions to the Fourth Circuit Court of Appeals raising the same questions as are now presented to this Court in their petition for certiorari.

The negligence of the petitioner is clearly established by the uncontradicted evidence placing the point of collision at a gouged out place made by the left rear wheel of the car on the south side of Highway 268, near the center line of the Traphill Road (R. 25, 26, 27), with marks leading from the gouged out place some 60 feet backwards to the place where the car was stopped by a tree (R. 24, 27, 145). These physical facts connected with the fact that the Hunt car had first entered the intersection and that the bus failed to yield the right of way (R. 12, 152, 153, 158), the fact that the bus was being operated to its left side of the highway (R. 12, 13, 137, 153, 158), the distance the bus traveled after the impact, the excessive speed of the bus as is evidenced by the distance the Hunt car was knocked, further establish the negligence

of the petitioner as being the proximate cause of the injuries sustained.

The negligence of the petitioner as the proximate cause of the injuries was established by the evidence in the following respects:

1. That the car in which the respondents were riding was in the intersection first (R. 45, 46, 52); therefore, it was the duty of the petitioner to yield the right of way as provided by North Carolina Gen. St. 20-147.

2. That the bus failed to travel upon the right hand portion of the highway (R. 12, 158) as provided in N. C. G. S. 20-147-148.

3. In that the bus was speeding as shown by the distance the Hunt car was knocked backwards from the point of impact (R. 24), the testimony of the bus driver that he was picking up speed (R. 157) in violation of N. C. G. S. 20-141, and the testimony of Hunt and Dancy as to the speed (R. 13, 44).

4. That the petitioner did not have his vehicle under proper control and failed to keep a proper lookout as evidenced by the statement of the bus driver that he was approaching a known dangerous intersection with which he was familiar (R. 155), and as evidenced by the fact that the bus failed to turn to the right into the Traphill Road (R. 158) contrary to the provisions of N. C. G. S. 20-140 (Pet. Br. 15).

5. That the petitioner could have reasonably foreseen that an automobile might enter Highway 268 from the Traphill Road as the bus driver was familiar with the road, having traveled it daily for 30 days, and knew at this time church was going on opposite the mouth of the Traphill Road, and that he was in a zone in which three churches

were located, was approaching the intersection which he knew was dangerous where his view was obstructed; that he had shifted gears from second to third; that he was picking up speed; that he turned left into the Hunt car instead of turning right into the Traphill Road (R. 155, 157). These acts of the petitioner were contrary to N. C. G. S. 20-141.

From any of these acts of negligence the jury could and did find that such negligence of the petitioner was the proximate cause of the injuries received by the respondents; or that such acts were concurrent negligence which was a proximate cause of the injuries received by the respondents.

The physical facts refute the statement that the Hunt car came out of the Traphill road on the extreme left close to the eight foot bank for the gouged out mark testified to as the point of impact clearly showed that the Hunt car was near the center line of the Traphill road when struck by the bus. The evidence of Hunt that he had completed his turn was corroborated by the statement of Dancy, that while the bus was a length from the eastern edge of the Traphill road he saw the Hunt car in the middle of Highway 268 and about the middle of the Traphill road intersection. That Hunt was completely across the highway and had straightened up is corroborated by the marks on the highway made by the left rear wheel of the Hunt car. All the evidence clearly shows that the Hunt car was in the intersection while the bus was either the length of the bus away from the eastern edge of the intersection (R. 152) or was 20 to 25 feet away (R. 158).

The mouth of the intersection was 96 feet wide (R. 62); the imaginary center line of the intersection of the Traphill road with Highway 268 is 67 feet west of the eastern edge of the mouth of the intersection and 28½ feet east of the west-

ern edge of the mouth of the intersection (R. 67); the front end of the bus extended 2 to 4 feet westwardly of the imaginary center line (R. 28, 34); the bus was 34 feet in length; the gouged out mark made by the Hunt car was eight to ten feet under the rear of the bus; therefore, as a matter of calculation from the physical facts, the point of impact occurred 45 to 47 feet west of the eastern edge of the mouth of the intersection.

It will be seen from the foregoing statement of facts that every material fact was controverted and at issue before the jury, and the jury has rendered its verdict upon these facts. The Fourth Circuit Court of Appeals having thoroughly reviewed the entire case, there is no serious reason advanced by the petitioners to require the opinion of the Circuit Court to be disturbed.

Reasons for Denying the Writ

I

The entire argument of the petitioner is based upon the contention that Hunt's negligence intervened and insulated the negligence of the bus driver, and that the court should so hold, notwithstanding the verdict of the jury. The respondents contend that there is no evidence that the negligence of Hunt, if any, was the proximate cause of the accident. All of the specific acts of negligence of Hunt which are complained of by the petitioners were in direct conflict, none being definitely established by the petitioner.

In so far as the doctrine of insulating or intervening negligence is concerned in this State, our courts have held in case after case that this doctrine cannot be established except upon clear and undisputed, uncontradicted, or admitted facts.

As stated by the Circuit Court of Appeals (R. 167) "despite the evidence of Hunt's negligence and the fact

that Traphill road was servient, the question of whether there was negligence of the defendant which was the proximate or concurring cause of the accident was for the jury, under proper instructions . . ."

"This phrase of 'insulated negligence' seems established in North Carolina practice. See *Butner* v. *Spease*, 217 N. C. 82, 6 S. E. (2d) 808, and *Reeves* v. *Staley*, 220 N. C. 573, 18 S. E. (2) 239. Insofar as this doctrine depends upon uncontroverted facts, it is not here controlling because most of the material facts in this case were in controversy."

In *Butner* v. *Spease*, 217 N. C. 82, 6 S. E. (2d) 808, the Court at page 210 says: "Here the essential facts are not in dispute. The liability of E. A. Spease, the driver of the truck, is established beyond all peradventure. Was his negligence the sole proximate cause of the collision? This is the real question posed by the record." The Court further said, "This doctrine of insulating the negligence of one by the subsequent intervention of the active negligence of another really belongs to the definition of proximate cause."

In *Reeves* v. *Staley*, 220 N. C. 573, 18 S. E. (2d) 239, the court in its opening statement said, 'These facts appear to be uncontroverted."

In the *Butner* and *Reeves* cases *supra*, as pointed out by the court the facts were undisputed and in the other cases cited by petitioner in its brief on this question the facts appear to be so clear and admitted that only one inference may be drawn from them, whereas in the instant case every material fact was seriously controverted, which presented a question for the jury to decide what was the proximate cause of the injury.

In the instant case the trial judge pointed out that this was not an action between the driver of the Hunt car and the bus, but was brought by the respondents, and specifically instructed the jury (R. 110) "But it is your duty to consider

any evidence here that shows any negligence on the part of the operation of the Hunt car, any evidence of negligence on the part of the bus driver in order to determine whose negligence really caused the trouble. That it is your duty to decide whether the negligence of Walter Hunt alone caused it and if it did, the defendant should not be required to pay for it, but if he was guilty of negligence in one or in several respects that proximately caused the injury and if the defendant was guilty of negligence which also became a proximate cause of it, and one without which it would not have happened, then so far as these plaintiffs are concerned, they are entitled to look to the defendant to compensate them for their injuries."

The court also charged on the theory of concurrent negligence (R. 92 & 93). On pages 86 to 89 of the record, the court very fully instructs the jury as to the contentions of the bus company relative to the acts of the driver of the Hunt car, and specifically on page 88 the court instructed the jury that the defendant contended that it was not guilty of any negligence at all but that this accident was due to the sole negligence of Hunt.

The Supreme Court of North Carolina in cases handed down since the *Reeves* and *Spease* cases, *supra*, has stated the principle- of law which we submit are applicable to this case.

In *Caulder* v. *Gresham*, 224 N. C. 402, 30 S. E. (2d) 312, 313, the court says: "Where the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties."

In *Henderson* v. *Powell*, 221 N. C. 239, 19 S. E. (2d) 876 at 879 the court said "No negligence is 'insulated' so long

as it plays a substantial and proximate part in the injury. Restatement of the Law, Torts, Sec. 447. 'In order to relieve the defendant of responsibility for the event, the intervening cause must be a superseding cause. It is a superseding cause if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury."

In the case of *Lancaster* v. *Atlantic Greyhound Corp.*, 219 N. C. 679, 14 S. E. (2d) 820, in a case involving an intersection accident the court holds: "If the defendant could base its theory of insulated negligence on clear and undisputed facts, showing the conduct of Crane, . . . to have been of the character which defendant ascribes to it, the defense might be worthy of more serious consideration. But there are difficulties in the way. Under the conflicting evidence upon the critical point at issue, we do not feel justified in taking the extreme view of the occurrence necessary to sustain defendant's contention. It would involve an assumption of facts which the jury, on the whole evidence, has obviously found to be otherwise.

"Instances in which active negligence, continuing to the moment of impact, may be insulated by intervening negligence must be comparatively rare. Such primary negligence is never insulated when it is obviously a substantial contributing factor. No doctrine of whatsoever kind ought to be mechanically applied against the reason of the thing.

"While the jury, if the issue had been before it, might have inferred from the evidence that Crane was negligent, the ultimate effect could have been no more than make him a joint tort-feasor with the defendant, and this, of course, would not alter the result of the trial."

In the trial of this action in the District Court, the only issue submitted to the jury, which was submitted without

for an issue as to intervening or insulating negligence was as follows: "Were the petitioners injured by the negligence of the defendant?"

Thus the theory of the entire trial was bottomed upon whether or not any negligence of the petitioner was the proximate cause of the injuries received by the respondents, and the jury, by its verdict, found that the petitioner was negligent in causing the injuries complained of.

There was no evidence of any new and independent cause breaking the sequence of events put in motion by the original negligence of the petitioner. As pointed out by the court in *Butner* v. *Spease, supra,* the doctrine of insulating negligence belongs to the definition of proximate cause and when the charge of the court is taken as a whole, we think that it properly and adequately instructed the jury as to the law of proximate cause arising from the facts in this action, and that it clearly and fully sets forth all of the contentions of the petitioner.

It is apparent from the decisions cited that the opinion of the Circuit Court of Appeals is in accord with the applicable decisions of the Supreme Court of North Carolina, and that the Circuit Court of Appeals has not decided a question of local law in conflict with the Supreme Court of North Carolina.

It is clear from the evidence presented in the instant case that it was one of concurrent negligence to be submitted to the jury upon instructions of proximate cause which the court properly and adequately did and was not one of intervening or insulating negligence.

II

As to this question, the petitioner did not request the court to charge that the violation of a safety statute was negligence per se nor did it object or except to the charge objection on the part of the petitioner and with no request

as given by the court (R. 108). The petitioner has overlooked the fact that this is an action brought by third parties to whom the negligence of Hunt could not be imputed. Assuming for the purpose of argument that the negligent acts of Hunt complained of by the petitioner to be negligence per se, the proof must go further and show that these acts were the sole proximate cause of the accident. In this case the ultimate effect could have been no more than make Hunt a joint tort-feasor with the defendant, and this, of course, would not affect the result of the trial, the jury having found that the negligent acts of the petitioner were a proximate cause of the injury.

III

In conclusion the respondents contend that petitioner made no specific object nor exception to the charge of the court as given, nor was any specific objection or exception interposed to the failure of the court to give any special instruction requested.

Rule 51 of the Rules of Civil Procedure provide- in part "no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections." See also Supreme Court Rule 8.

The record fails to disclose that the petitioner at any time made any specific objection or exception to the charge of the court as given and of which he is now complaining nor does it disclose that the petitioner at any time made any specific objection or exception to the failure of the court to give any of the special instructions of which he is now complaining.

In *Palmer* v. *Hoffman*, 318 U. S. 109, 119; 63 S. Ct. 477, 483, the Court said: "In fairness to the trial court and to

the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. (Citing authorities) That long standing rule of Federal practice is as applicable in this type of case as in others. That rule cannot be avoided here by reason of the requested charge.

It is, therefore, respectfully submitted that this petition for a writ of certiorari should be denied.

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APPENDIX

The following sections are part of Chapter 20, Motor Vehicles of the General Statutes of North Carolina:

Section 21-141. Speed restrictions.

"(a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

"(b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

• • • • • • •

"2. Twenty-five miles per hour in any residence district;

• • • • • • •

"(c) The fact that the speed of a vehicle is lower than the foregoing prima facie limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care. It shall be unlawful to violate any provision of this section, and upon conviction the violator shall be punished as provided in Sec. 20-180."

Section 20-147. Keep to the right in crossing intersections or railroads.

"In crossing an intersection of highways or the intersection of a highway by a railroad right-of-way, the

driver of a vehicle shall at all times cause such vehicle to travel on the right half of the highway unless such right side is obstructed or impassable."

Section 20-148. Meeting of vehicles.

"Drivers of vehicles proceeding in opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible."